HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 1441 of 2005 (MS)

1. Gurumukh Singh s/o Sri Karatar Singh, Village Ikghara (Vikrampur) P.O. & Tehsil Bazpur, District Udham Singh Nagar
2. Smt. Sukhvinder Kaur w/o Sri Gurmukh Singh Village Ikghara (Vikrampur) P.O. & Tehsil Bazpur, District Udham Singh Nagar.
3. Jagdish Singh s/o Sri Darshan Singh village Vikrampur P.O. & Tehsil Bazpur, District Udham Singh Nagar
4. Jagjeet Singh s/o Sri Singhara Singh, Village Hajeera P.O. & Tehsil Bazpur, District Udham Singh Nagar.

..... Petitioners

Versus

1. Nainital Almora Kshetriya Gramin Bank, Head Office Nepoli Hotel, Dina Lodge, Nainital
2. Civil Judge, Senior Division, Udham Singh Nagar.

..... Respondents

Sri Jagdish Prasad, Advocate for the petitioners.
Sri Lalit Belwal, Advocate for the respondents.

Dated: 27.7.2006

Hon'ble Rajesh Tandon, J.

By the present writ petition the petitioners have prayed for a writ of certiorari quashing the order dated 26.10.2005 passed by the respondent no.2.

Briefly stated a suit was filed by respondent no.1 being suit No.1 of 2005 in the Court of Civil Judge, Sr. Division, Udham Singh Nagar, for the recovery of Rs. 5,70,851.00. The suit was instituted on 3rd January 2005 and summons were served on the defendants on 25.1.2005. An application was moved on behalf of the petitioners for adjournment which was

allowed fixing 28th March 2005. The respondent no.1 filed an application requesting the Civil Judge not to accept the written statement as it was filed after 90 days. The respondent no. 2 rejected the written statement vide order dated 26.10.2005.

Copy of the application dated 14.10.05 shows that along with the summons, documents were not sent to the petitioner and, therefore, the petitioners were unable to file written statement. The presiding officer of the trial court has passed order on 26.10.05 refusing to admit the written statement on the ground that no reasons have been given by the petitioners for filing the written statement beyond the period of 90 days.

Order 8 Rule 1 of the Code of Civil Procedure provides as under:

Written statement- *The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence.*

> *Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other days, as may be specified by the Court, for reasons to be recorded in writing but which shall not be later than ninety days from the date of service of summons.*

The word 30 days has been inserted by virtue of Code of Civil Procedure (Amendment) Act, 2002 which provides that the written statement shall be filed within 30 days but the court may allow further time to file written statement for reasons to be recorded in writing but it shall not be later than ninety days from the date of service of summons.

Order 5 Rule 2 of the Code of Civil Procedure provides that every summons shall be accompanied by a copy of the

plaint. The contention of the petitioners is that the summons were not accompanied with a copy of plaint and as such it was not possible for them to file written statement.

The Apex court in the case Shaikh Salim Haji Abdul Khaymsab vs. Kumar and others [2006 (62) ALR 316, has held that procedural law should not ordinarily be constructed as mandatory. The Apex court has observed as under:

"No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has not other right than to proceed according to the altered mode. A procedural law should not ordinarily be construed as mandatory, the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed."

In the case Kailash vs. Nanhku (2005) 4 SCC 480 similar view has been taken by the Apex Court and has held as under:

"Ordinarily, the time schedule prescribed by Order 8 Rule 1 has to be honored. The defendant should be vigilant. No sooner the writ of summons is served on him he should take steps for drafting his defence and filing the written statement on the appointed date of hearing without waiting for the arrival of the date appointed in the summons for his appearance in the court. The extension of time sought for by the defendant from the court whether within 30 days or 90 days , as the case may be, should not be granted just as a matter of routine and merely for the asking, more so, when the period of 90 days has expired. The extension can be only by

way of an exception and for reasons assigned by the defendant and also recorded in writing by the court to its satisfaction. It must be spelled out that a departure from the time schedule prescribed by Order 8 Rule 1 of the Code was being allowed to be made because the circumstance were exceptional, occasioned by reasons beyond in the control of the defendant and such extension was required in the interest of justice, and grave injustice would be occasioned if the time was not extended."

As will appear form the aforesaid observation of the Apex Court, Order VIII Rule 1 has been held to be directory and not mandatory. I have also taken similar view in Civil Revision No. 27 of 2004, Heeraballabh vs. State of Uttaranchal & others.

In view of above, a writ of certiorari is issued quashing the order dated 26.10.2005. Respondent no.2 is directed to admit the written statement filed by the petitioners on record and thereafter to decide the case in accordance with law.

Accordingly, writ petition is allowed. No order as to costs.

Dated: 27.7.2006 **Rajesh Tandon, J.**

*Dhyani